IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO 4945 OF 1993
WITH
CIVIL APPLICATION NO. 1882 OF 2005.

Arun Anant Tavkar,
Resident of Flat No.3, Suyesh,
Phirozshaw Mehta Road,Vile
Parle (E), Bombay 400 057. ..Petitioner

V/s

Smt. Suhas Yeshwant Narkar
residing at Suyesh Phirozshaw
Mehta Road, Bombay 400 057, .. Respondent.

Mr. Chetan Agarwal i/b V.T. Tulpule for the petitioner.
Mr. R.N. Bhagatjee for the respondent.

CORAM : ANOOP V.MOHTA J.
DATE : 12TH AUGUST, 2005.

ORAL JUDGMENT

. The petitioner-tenant has invoked Article 227 of the Constitution of India and thereby, sought to challenge a judgment and order passed in Appeal No. 94 of 1992 by Small Cause Court, Bandra Branch, dated 12th October, 1993, whereby, the appellate Court has allowed the appeal of the respondent-landlord and the judgment and order dated 6th April 1992, passed by the Small Cause Court (Trial Court) was set aside and granted the decree in favour of the respondent on the ground of default, as contemplated under Section 12 of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947

(for short Bombay Rent Act). Therefore, the present petition.

2. The petitioner is a tenant of Flat No.3, first floor, " Suyesh", Phirozshaw Mehta Road, Vile Parle (East), Bombay. There was some dispute going on between the parties in reference to the parking of the car in the compound of the building. By the notice dated 14/6/1985, the respondent landlord demanded the increase in rent, and the same was received by the respondent on 5th July,, 1985. The petitioner alleged to have sent rent through the money order on 19/6/1985, for the period of January and February 1985. The said money order was redirected by the respondent to Assam in the month of July, 1985. The said money order was not accepted and therefore, returned back in the month of August 1985.

3. The respondent thereafter, issued demand notice for the arrears of rent of six months, for the period from 1/1/1985 to 30/6/1985. The said demand notice was duly served and acknowledged by the petitioner on 5th July, 1985. The petitioner, however, not complied with the said notice, and not objected or filed any

application for fixation of standard rent. That resulted into filing of a suit R.A.E. & R. Suit No. 1875/5658 of 1984 in the trial Court. The petitioner-tenant basically, resisted the said suit on the foundation of non receipt of the demand notice dated 3rd July, 1985. When the envelope was opened by the petitioner-tenant, it was not contained letter dated 3rd July 1985 but it was letter dated 14th July, 1995. Therefore, the respondent-landlord, as alleged, played fraud by sending such letter under the guise of demand notice dated 3rd July, 1985. The reference was also made about the refusal of the money order. In this background the petitioner sought to contend that there was no question of complying with the demand notice. The parties led evidence. The petitioner-tenant examined himself. The respondent led evidence through his Wife and the Constituted Attorney (C.A). The trial court after considering the rival contentions raised by the parties, dismissed the suit on 6/4/1992.

. The respondent-landlord preferred the appeal. On the same pleading and evidence placed on the record. The appellate Court reversed the said findings and allowed the appeal and granted the decree.

4. Heard the learned Counsel, Mr. Agarwal, appearing for the petitioner and the learned Counsel, Mr. Bhagatjee for the respondent. In the present case admittedly, there is no dispute that the petitioner-tenant had received envelope, which according to the respondent-landlord was demand notice dated 3rd July, 1985. The Postal endorsed envelope, apart from the evidence led by the landlord, support the case of issuance and the receipt of the said demand notice. There was no dispute raised by the petitioner that he had not received such envelope. He in fact not disputing the acknowledgement and receipt of the such envelope. Therefore, once the demand notice, as contemplated under the Bombay Rent Act was issued and received by the tenant, he had no option but to comply with the statutory provisions, to claim protection as available under the Bombay Rent Act.

5. However, the learned advocate appearing for the petitioner based on the pleading already raised in the written statement, agitated that no demand notice, dated 3rd July, 1985, was received by the petitioner in the said envelope. It was the notice dated 14th June, 1985.

Therefore, in absence of the contents of the demand of the arrears of rent by the landlord, said letter dated 14/6/1985 could not have been treated, as demand notice for the purpose of granting the decree under the Bombay Rent Act. There was no arrears of rent demanded in 14/6/1995 letter. In the present case, therefore, the petitioner has made positive assertion that the notice dated 14/6/1985, no way determined or can be treated as a demand notice as said envelope was not containing the demand notice dated 3rd July, 1985. The petitioner-tenant who alleged to have opened the envelope in question, was not examined. The wife of the petitioner examined, as a witness in this matter. There is no other independent witness examined to support this. The question here is that as per the case of the wife of the petitioner the envelope was opened by the petitioner himself, in her presence and at that time they found the letter, dated 14th June, 1985, instead of letter, demand notice dated 3rd July, 1985. This fact need further corroboration, for the various reasons. The petitioner or the person who makes positive assertion must demonstrate, he had received the letter dated 14th June, 1985 and not of 3rd July, 1985. The person who opened the envelope i.e. the tenant ought to

have supported the said assertion by examining himself. There is nothing to justify on the record that the said envelope was opened by the petitioner, except the version and words of wife of the petitioner. In these circumstances, it is difficult to accept the case of the petitioner that they had not received the demand notice dated 3rd July, 1985.

6. The petitioner's wife in her evidence unable to express positively when and who gave the said acknowledgement. It was not the receipt of the envelope in dispute, but its contents. In absence of other corroborative evidence and the material on the record, mere words of wife of the petitioner are insufficient to accept that they had discharged their basic burden to support their case that they had not received the demand notice dated 3rd July, 1985.

7. The appellate Court, after considering the material on the record, observed rightly, that the petitioner was in arrears of rent for 6 months. The requirement of Bombay Rent Act, is that if the tenancy is monthly, the tenant must deposit rent regularly. In the present case, even assuming for a moment that some

money order was sent. But that money order was also for 2 months and not of total arrears of rent. It is not the case that the tenant used to sent money orders regularly on every month and which were refused. The accumulated rent, if sent by the tenant that its self is not sufficient reason to accept, their case, that they were not willful defaulters, as contemplated under the Bombay Rent Act. Irregularity in payment of rent can be protected only when the case is made out of depositing the rent after the demand notice. The tenant must raise objection or make appropriate application to dispute the rent or for fixation of standard rent, failing which, as mandate requires and as accepted by the various Judgments of the Apex Court, as well as, Bombay High Court, there is no option but to grant a decree in such cases, on the ground of default.

8. The appellate Court therefore, right in granting the decree in the present case on the ground of default, specially when the tenant failed to prove that there was no demand notice, as contemplated under the Act. In the present case, therefore, for want of substantial material in respect of the case of non receipt of the demand notice, the reason given by the appellate Court

appears to be within the frame work of law.

9. Another facet of the allegation of fraud need a positive support of the evidence. Such plea of fraud in absence of any supporting evidence is difficult to accept. In the present case, there is no material placed on the record. The tenant, whatever may be reason unable to step in the witness box to contradict the landlord or to support his own case even of the fraud. This aspect also sufficient to reject the case of fraud as sought to be contended by the petitioner and rightly observed by the appellate Court.

10. The learned Counsel appearing for the respondent by a civil application dated 21st July, 2005, , prayed to consider the another ground, of closure of the premises for more than six months, as contemplated under section 13(1)(k) of the Bombay Rent Act, for the first time in the petition under Article 227 of the Constitution of India. The learned advocate for the petitioner unable to get instructions to oppose or to file any counter affidavit to this application. The counsel for the respondent vehemently, submitted that the subsequent events should be taken into account and

on this additional ground also the decree of eviction be maintained. The Bombay Rent Act provides various clause of which landlord can take resort to evict the tenant. In the present case, the landlord had invoked the law of default. The writ petition has been pending since 1993.This application for additional ground under clause 13(1)(k) has been filed on 21st July, 2005, it means during all these period of 12 years, there was no such case made out as contemplated under the Act and as sought to be raised for the first time. He strongly relied on various judgments in support of his submissions that subsequent events should be taken note of, in the pending litigation out of the landlord and the tenant's relationship. There is no case of the bonafide need of the respondent. The basic case was the ground of default. Now the landlord wants to invoke an additional clause of 13(1)(k), this changes whole and basic foundation of the original case.

11. The facet which require to be noted here is that it is not the case, where the other party has accepted the plea, as raised for the first time in the High Court. In absence of admitted facts on the record, the High Court under Article 227 of the Constitution of

India cannot consider such disputed facts. In the present case, the tenant has not accepted the plea and contention as raised by the landlord in the affidavit dated 21st July, 2005. In the present case, as already referred above, the landlord took 12 years to file such application. Whatever may be circumstances, in this background, it is difficult to accept such additional disputed plea raised for the first time in the present writ petition. The parties are at liberty to take appropriate steps if so advise. The Civil Application No.1882 of 2005 is dismissed with liberty.

12. In the present case as the landlord is able to justify the case, on the ground of default, there is no reason now to disturb the findings in any way. The reasoning, as given by the appellate Court appears to be within the frame work of the record, as well as the law.

13. Taking above in to account, the writ petition is dismissed. Rule discharged. No order as to cost.

. At the request of the Counsel appearing for the petitioner, time to vacate is granted for the six months on filing an usual undertaking within 4 weeks, failing

which the landlord is at liberty to execute the decree in accordance with the law. The tenant should not create any 3rd party interest during the extended period.

. Certified copy be expedited.

[ANOOP V. MOHTA, J.]